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In the Supreme Court of the United States

OCTOBER TERM, 1994

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

BRENDA LAMPKIN, AS LEGAL GUARDIAN OF JESSICA LAMPKIN AND CHRISTINE LAMPKIN, MINORS, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Whether, in light of *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), and *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), a federal grant statute, which, like the McKinney Homeless Assistance Act here, merely requires States and the District of Columbia to submit plans acceptable to designated federal executive branch officials as a condition of receiving federal funding, creates individual rights enforceable pursuant to 42 U.S.C. § 1983.

PARTIES

Petitioners, who were defendants below, are the District of Columbia; its Mayor, Sharon Pratt Kelly; the District of Columbia Public Schools ("DCPS"); and Dr. Franklin L. Smith, DCPS Superintendent. Both the Mayor and Dr. Smith were sued in their official capacities only.

Respondents, who were plaintiffs below, are Brenda Lampkin, as legal guardian of Jessica Lampkin and Christine Lampkin; Sadie Chatmon, as legal guardian of Aqua Chatmon; Denise Dabney, as legal guardian of Dejuan Dabney; Barbette Fribbley, as legal guardian of Ashley Fribbley; Dawn Harvell, as legal guardian of Krystal Harvell and Charles Harvell; Gail Mason, as legal guardian of Clifton Morse, Jr., and Ashley Mason; Twana Robb, as legal guardian of Michael Robb and Calvin Robb; Maria Summers, as legal guardian of Donald Taylor; Patricia Sumpter, as legal guardian of Eric Sumpter; and Cherise Thornes, as legal guardian of Kendra Thornes. In addition, the National Law Center on Homelessness and Poverty, a not-for-profit corporation, was also a plaintiff.

Several members of the House of Representatives appeared as *amici curiae* in the court of appeals: Jim Bacchus, Thomas Foglietta, Tom Lantos, Robert Matsui, George Miller, Patricia Schroeder, Louise Slaughter, and Jolene Unsoeld.

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Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

The District of Columbia and several of its officials petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit (App. 1a-18a) is reported at 27 F.3d 605. The decision of the United States District Court for the District of Columbia (App. 21a-35a) is not reported.

The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

JURISDICTION

The D.C. Circuit entered its judgment on July 1, 1994. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Stewart B. McKinney Homeless Assistance Act ("McKinney Act"), Pub. L. No. 100-77, 101 Stat. 482, codified as amended at 42 U.S.C. § 11301 *et seq.*, and 42 U.S.C. § 1983. The pertinent provisions of the McKinney Act are reproduced in the Appendix. App. 37a-52a. 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of . . . the District of Columbia, subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured . . ..

STATEMENT OF THE CASE

INTRODUCTION

In recent years, Congress has enacted a wide variety of legislation in which it has offered "seed" money to the States and the District of Columbia to encourage them to address pressing social problems more effectively. One of these efforts is the 1987 McKinney Act.

The McKinney Act is an important, yet modest, federal effort to alleviate homelessness in this country and the problems associated with homelessness. The principal provisions

of the Act are directed at encouraging the identification and development of low-cost housing and increasing the availability of medical treatment, including psychiatric and psychological treatment, for the homeless. In addition, the Act seeks to assist the states and the District of Columbia in improving the education of homeless children. Congress has provided modest sums of money annually to achieve these goals.

Despite the long-range goals of the McKinney Act, and the modest federal funds Congress has provided to implement the Act, the D.C. Circuit, in a two-to-one decision, has held that the Act confers upon homeless children a right to educational and related benefits that is enforceable in an action pursuant to 42 U.S.C. § 1983. In so ruling, the panel majority decided that this case was not controlled by *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), and *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). The panel majority did so even though this Court held that analogous federal funding programs designed to assist the states and the District in helping children in foster care (*Suter*) and mentally disabled persons (*Pennhurst*) did not create rights enforceable pursuant to 42 U.S.C. § 1983. As a result of this decision, a modest federal grant program has been transformed into a largely state-funded entitlement program, and the District of Columbia is now faced with the choice of withdrawing from the program or being saddled with large financial obligations that Congress did not intend to impose.

I. THE LANGUAGE OF THE MCKINNEY ACT.

This case principally involves two sections of Part B of Title VII of the McKinney Act, 42 U.S.C. §§ 11431 & 11432. Section 11431 is a statement of policy. Section 11432 authorizes the Secretary of Education to award federal grants to qualifying states; lists the activities for which such grants

may be used; and describes the elements of a plan a state must submit in order to receive a McKinney Act grant, including state assurances that localities to which it transmits McKinney Act funds will comply with specified conditions.[1/]

More specifically, section 11431 states:

> It is the *policy* of the Congress that--
>
> (1) each State educational agency shall assure that each child of a homeless individual and each homeless youth have *access to a free, appropriate public education* which would be provided to the children of a resident of a State and is consistent with the State school attendance laws.
>
> (2) in any State that has . . . laws, regulations, practices, or policies . . . that may act as a barrier to the enrollment, attendance, or success in school of homeless children and homeless youth, the State *will review and undertake steps to revise such laws* to assure that the children of homeless individuals and homeless youth are afforded a free and appropriate public education.
>
> (3) homelessness alone should not be sufficient reason to separate students from the mainstream school environment.

42 U.S.C. § 11431 (emphasis added).

[1/]The McKinney Act defines the District of Columbia as a state. See 42 U.S.C. § 11435(2).

Section 11432, entitled "Grants for State and local activities for the education of homeless children and youth," has several components that are relevant to this case. Subsection (a) provides that "[t]he Secretary of Education is, in accordance with the provisions of this section, authorized to make grants to States to carry out the activities described in subsections (c), (d), and (e) of this section."

Subsection (c), entitled "Authorized activities," provides in pertinent part:

> *Grants under this section shall be used --*
>
> (1) to carry out the policies set forth in section 11431 of this title in the State;
>
> (2) to provide activities for and services to homeless children and homeless youths that enable such children and youths to enroll in, attend, and achieve success in school;
>
> (3) to establish or designate an Office of Coordinator of Education of Homeless Children and Youth in accordance with subsection (d) of this section;
>
> (4) to prepare and carry out the State plan described in subsection (e) of this section;
>
> (5) to develop and implement programs for school personnel to heighten awareness of specific problems of the education of homeless children and youth . . ..

42 U.S.C. § 11432(c)(emphasis added).

Subsection (d), entitled "Functions of the Office of Coordinator," describes the functions of the Office, including data collection and reporting, development and implementation of the state plan, and co-ordination with other agencies and groups that provide support to the homeless.

Subsection (e), entitled "State plan," is the lengthiest provision. Paragraph (1) states: "Each State shall adopt *a plan* to provide for the education of each homeless child or homeless youth within the State which will contain provisions *designed to*" achieve nine specific goals set forth in subparagraphs (A) through (I). 42 U.S.C. § 11432(e)(1) (emphasis added). The required goals include those *designed to* "provide procedures for the prompt resolution of disputes regarding the educational placement of homeless children and youth" (subpara. (B)); "ensure that homeless children and homeless youths who meet the relevant eligibility criteria are able to participate in Federal, State, or local food programs" (subpara. (D)); "ensure that homeless children and homeless youths who meet the relevant eligibility criteria are able to participate in Federal, State, or local before- and after-school care programs" (subpara. (E)); "address problems with respect to the education of homeless children and homeless youths, including problems caused by . . . transportation issues" (subpara. (G)); and "demonstrate that the State and local educational agencies in the State have developed and will review and revise policies to remove barriers to the enrollment and retention of homeless children and homeless youths in schools of the State" (subpara. (H)).

Paragraph (2) of subsection (e), in turn, requires states to assure the Secretary that they will require localities receiving funding under the Act to meet certain obligations:

> *Each plan . . . shall assure*, to the extent practicable under requirements relating to education established by State law, that local educational agencies within the State will comply with the requirements of paragraphs (3) through (9).

42 U.S.C. § 11432(e)(2) (emphasis added).[2/] The required state plan assurances set forth in paragraphs (3) through (9) include provisions that states "assure" that local educational agencies: place a homeless child in a school that is in his "best interest" (subpara. (3)(A)); provide to each homeless child "services comparable to services offered to other students in the school . . ., including transportation services, educational services for which the child meets the eligibility criteria . . . and school meals programs" (¶(5)); "coordinate with local social services agencies, and other agencies or programs providing services" to homeless children (¶(7)); "designate a homelessness liaison to ensure," *inter alia*, that "homeless children . . . enroll and succeed" in school (¶ 8)); and "review and revise any policies that may act as barriers to the enrollment of homeless children . . . in schools" and "consider[]" "issues concerning transportation, requirements of immunization, residency, birth certificates, school records, or other documentation, and guardianship" (¶(9)).

Finally, subsection (f) governs applications for grants. It provides: "No State may receive a grant . . . unless the State educational agency submits an application to the Secre-

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[2/]Because the District of Columbia is defined as a state by the McKinney Act (see *supra* note 1) and does not have local educational agencies to which it distributes funds, section 11432(e)(2)-(9) is technically not applicable to it. However, the District concedes that it is bound by the substance of these provisions -- that is, that its plan must assure that it will comply with those provisions.

tary at such time, in such manner, and containing or accompanied by such information as the Secretary may reasonably require."[3/]

II. THE LEGISLATIVE HISTORY OF THE ACT.[4/]

The legislative history of the McKinney Act demonstrates that Congress was acutely aware that state and local resources, both generally and for the purpose of dealing with the problems of the homeless, were stretched to capacity. It also demonstrates that Congress was acutely aware that the

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[3/]The McKinney Act also contains two other relevant provisions. 42 U.S.C. § 11433(d) governs the content of an application for McKinney Act funds from local to state educational agencies. It states that such an "application shall include . . . assurances that the applicant complies with *or will use requested funds to come into compliance with paragraphs (3) through (9) of section 11432(e)* . . .." (Emphasis added). 42 U.S.C. § 11433(d)(1)(B).

Section 11434(b)(1), in turn, governs the responsibilities of the Secretary of Education. It states:

> The Secretary shall monitor and review compliance with the provisions of this part . . .. In reviewing the State plans submitted by the State educational agencies under section 11432(e) of this title, the Secretary shall evaluate whether State laws, policies, and practices described in such plans adequately address the problems of homeless children and homeless youth relating to access to education and placement as described in such plans.

[4/]The legislative history is somewhat unusual. The Senate did not produce a report to accompany its bill. The House produced two reports but the House bill did not contain any provision for educational services for homeless children. See 1987 U.S. Code Cong. & Admin. News 362-411. Its two reports are nevertheless useful in determining the nature and purposes of the Act.

Act was only a first, albeit important, federal step in addressing the problems of homeless persons. The Act was not expected to produce shelter for everyone in this country or to alleviate, much less eliminate, all the problems of all the homeless persons in this country. On the contrary, Congress was well aware that, even with the injection of federal resources to assist the homeless, their needs would not, and could not, fully be met.

Thus, as one House Report stated: "The resources of communities, nonprofit groups and charitable institutions are stretched to the breaking point as they attempt to provide basic shelter and essential services for the homeless." House Rep. No. 100-10(I), 100th Cong., 1st Sess., 1987 U.S. Code Cong. & Admin. News 362. That report also recognized that, "[c]onsidering the magnitude of the problem," the proposed Act was "a modest federal response." *Id.* at 366. A companion House Report, in turn, stated that the purpose of the Act was "to assist and encourage local public or private agencies to increase their efforts to meet the health needs of the homeless." House Report No. 100-10(II), 100th Cong., 1st Sess., 1987 U.S. Code & Cong. & Admin. News 400.

The House Conference Report, No. 100-174, 100th Cong., 1st Sess., 1987 U.S. Code Cong. & Admin. News 441, reiterated these points. It observed that Congress had "found an immediate and increasingly severe crisis of homelessness which demands greater resources than ha[ve] been provided by public and private organizations." *Id.* In addition, it stated:

> Indications are that the problem is not improving. The U.S. Department of Housing and Urban Development estimated that 250,000 persons were homeless in 1984. Current esti-

> mates by the National Coalition for the Homeless are that as many as 3 million individuals may be homeless. Washington city officials reported a 500 percent increase in the number of homeless families seeking shelter just this year.

Id. at 472.

In the floor debates on the compromise measure, the same themes were sounded -- the themes of too-scarce state and local resources and the need to provide some federal assistance to help deal with the rapid growth of the homeless population in this country. Thus, Senator Cranston characterized the Act as one which "lays the foundation for a national commitment to end homelessness in America." 133 Cong. Rec. 17926, 100th Cong., 1st Sess. (June 27, 1987). He also observed that the McKinney Act "gives State Governors and the mayors of major cities responsibility for developing coherent homeless assistance strategies tailored to local needs" and "would provide some additional support for . . . educational services for homeless children." Id. at 17926 & 17926-27. *See also, e.g.*, Senator Kennedy (The McKinney Act "is a downpayment by Congress on coming to grips with this problem" and "is a start but . . . only a start.") (*Id.* at 17932).

In short, the legislative history demonstrates that Congress, in passing the McKinney Act, was well aware that even with its new federal commitment, states would not have the financial resources necessary to resolve the problems of the homeless. Instead, Congress' purpose was to assist the states in tackling these problems more systematically and effectively.

III. THE TRIAL COURT.

This suit was filed by homeless parents on behalf of their children. In their complaint, they alleged that the District had violated certain rights guaranteed by the McKinney Act: (1) the statement-of-policy provisions (§ 11431(1) & (2)); (2) the provisions describing the activities for which McKinney Act funds may be used (§ 11432(c)(2) & (4)); and (3) the list of elements for which state plans must give assurances about the activities of local educational agencies to which they distribute McKinney Act funds (§ 11432(e)(3), (5), (7), (8), and (9)). Plaintiffs sought injunctive relief requiring, *inter alia*, that the District make "best interest" determinations in assigning homeless children to schools, provide transportation to and from school, and ensure that they have access to various educational and school meal programs.

The Honorable Royce C. Lamberth dismissed the complaint for failure to state a claim. He held that the McKinney Act does not confer individual rights and thus that the violations of the Act alleged are not redressable under 42 U.S.C. § 1983. App. 21a-32a. His decision was based on two central considerations. First, the McKinney Act "is basically a grant statute" pursuant to which the District receives a very modest sum of money annually -- $50,000.00 -- to assist homeless children in continuing their education. App. 22a; see App. 31a-32a. Second, and more importantly, the McKinney Act is not distinguishable from the Adoption Assistance and Child Welfare Act which, this Court held in *Suter v. Artist M.*, *supra*, does not create enforceable rights. Both statutes are, in part, "mandatory in their terms," but "both statutes only require states to submit plans or applications to be approved by the federal government." App. 30a, 31a. Because *Suter* was controlling, Judge Lamberth declined to engage in the analysis set forth in this Court's earlier decision

in *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990). App. 31a n.7.[5/]

IV. THE DISTRICT OF COLUMBIA CIRCUIT.

A divided panel of the D.C. Circuit reversed. The majority (Edwards & Buckley, JJ.) characterized the McKinney Act as:

> a mix of large visions and gritty detail, combining specific sections dealing with the provision of education of homeless children and youths with a broad congressional policy that "each State educational agency . . . assure that each child of a homeless individual and each homeless youth have access to a free, appropriate public education . . .."

App. 2a, quoting 42 U.S.C. § 11431.

In its decision, the panel majority acknowledged that "[a] statute will not be deemed enforceable under section 1983 if Congress did not intend to create any enforceable rights in it . . . and where the statute 'did not create enforceable rights, privileges, or immunities within the meaning of § 1983.'" App. 5a, quoting *Wright v. Roanoke Redev. and Hous. Auth.*, 479 U.S. 418, 423 (1987). These "exceptions" to the rule of enforceable rights are, according to the panel majority, "more

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[5/]Judge Lamberth also ruled that (1) any alleged less favorable treatment of homeless children vis-a-vis handicapped children does not violate the equal protection component of the Due Process Clause of the Fifth Amendment to the Constitution; and (2) the McKinney Act cannot be interpreted to create by implication a private right of action under *Cort v. Ash*, 422 U.S. 66 (1975), and its progeny. App. 32a-35a. Neither of these rulings was challenged on appeal.

easily stated than applied, as will be apparent from the Supreme Court's decisions" in *Wilder* and *Suter*. App. 5a.

Following a discussion of *Wilder* and *Suter*, the panel majority ruled that the *Wilder* framework was proper. Under *Wilder*, a court is required to ask whether a federal statutory provision is "intended to benefit the putative plaintiff." App. 6a. If the provision is so intended, it

> "creates an enforceable right unless it [1] reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation on the governmental unit . . . or [2] unless the interest the plaintiff asserts is too vague and amorphous such that it is beyond the competence of the judiciary to enforce."

App. 6a, quoting *Wilder*, *supra*, 496 U.S. at 509, and omitting citations to *Pennhurst*, *supra*.

Here, the panel majority ruled, "the McKinney Act was enacted to benefit homeless children" and did not merely express a congressional preference for a certain kind of conduct. App. 10a. Thus, section 11432(c) specifies the activities for which McKinney Act grants may be used, including "*inter alia*, 'to prepare and carry out the State plan.'" App. 11a. More importantly, section 11432(e)(2) mandates that "'[e]ach plan . . . assure . . . that local educational agencies . . . will comply with'" the "highly specific instructions" contained in paragraphs (3) through (9) of subsection 11432(e). App. 11a. It was this "gritty detail" that was critical to the panel majority even though these provisions merely list the assurances states must make to the Secretary in their plans concerning the activities of local educational agencies receiving McKinney Act funds.

The statute in *Suter*, according to the panel majority, was distinguishable. First, "[a]lthough both Acts describe in detail the contents of the plan a participating State must adopt, only the McKinney Act provides specific directions for the plan's execution." App. 11a. Second, the McKinney Act "differs significantly from the Adoption Act in that paragraphs (3) through (9) of subsection 11432(e) of the McKinney Act not only inform the State in great detail on how its plan is to be implemented, they impose obligations that are independent of the plan." App. 12a. What was critical was that the McKinney Act contains "specific, mandatory terms." App. 12a.

The panel majority addressed several other matters, including the following. First, citing *Suter*, the panel majority stated that "the McKinney Act contains no statutory mechanism for the administrative enforcement of the beneficiaries' rights suggesting that Congress did not intend to [foreclose][9] a private cause of action that is enforceable under section 1983." App. 13a. Second, citing federal legislation governing the education of handicapped children, which also requires "a free, appropriate public education," the panel majority ruled that the McKinney Act provisions at issue were not so vague as to be beyond the competence of the judiciary to enforce. App. 15a.

Judge Sentelle dissented. In his view, "the genuine statutory duty of a recipient state under the McKinney Act is to 'prepare and carry out' a plan '*designed to*' achieve nine designated goals." App. 17a, quoting 42 U.S.C. §§ 11432(c)(4) & 11432(e)(1) (emphasis by Sentelle, J.). This statutory scheme is no different from that in *Suter*, which also dealt with a statute containing mandatory language and specific, detailed provisions. App. 17a. Furthermore, the "de-

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[9]As amended on July 28, 1994.

signed to" and "best interest" language is just as amorphous as the "reasonable efforts" language considered in *Suter*. App. 17a.

REASONS FOR GRANTING THE WRIT

This Court should review the decision of the D.C. Circuit for three reasons. First, Congress has increasingly used federal grant programs to assist hard-pressed states and the District of Columbia in addressing widespread, serious, and intractable social problems. The funding provided in such programs ranges from "seed" money to nearly full funding, and the conditions for receipt of such funding range from the submission of a plan acceptable to designated federal executive branch officials to the assumption of varying obligations to beneficiaries of the legislation. The question of just what conditions accompany federal grants, and what obligations acceptance of such grants impose on the states and the District, when Congress adopts one legislative model rather than another, is thus of important, nationwide significance.

Second, the D.C. Circuit's decision in this case is in conflict with this Court's decisions in *Suter* and *Pennhurst* and is otherwise seriously flawed. In *Suter*, for example, this Court ruled that the Adoption Assistance Act, which also contains mandatory language and requires states to submit plans meeting numerous criteria, including quite specific criteria, does not create enforceable rights. By contrast, the D.C. Circuit, in the context of a modest federal assistance program, interpreted the McKinney Act by focusing on its "gritty detail" without regard to the context in which this detail is found -- *the obligation of states to give assurances* that local educational agencies to which they transmit McKinney Act funds will do certain things. Furthermore, the D.C. Circuit overlooked the fact that when Congress wants to create

an enforceable right to a free, appropriate public education, it knows how to do so, as it did in legislation aiding handicapped children.

Third, this Court needs to give guidance to the federal courts of appeals which have been struggling unsuccessfully to reconcile *Suter* and *Pennhurst* with *Wilder*. Their efforts have resulted in at least three distinct approaches for determining whether a federal grant statute creates rights enforceable under 42 U.S.C. § 1983, and two of these approaches have been criticized by judges bound by the law of their respective Circuits. This Court should clarify this important aspect of its jurisprudence to ensure that similar federal grant statutes are consistently construed and to prevent the states and the District from being subjected to financial burdens not intended by Congress, burdens that include not only the costs of entitlement programs but also attorney's fees.

I. THE DECISION OF THE D.C. CIRCUIT CONFLICTS WITH THIS COURT'S DECISIONS IN *SUTER* AND *PENNHURST*.

In *Suter* and *Pennhurst*, this Court ruled that a federal statute enacted pursuant to the Spending Clause must "unambiguously" confer rights before a beneficiary of the statute may enforce it pursuant to 42 U.S.C. § 1983. *Suter*, *supra*, 112 S. Ct. at 1366; *Pennhurst*, *supra*, 451 U.S. at 17. In *Suter* and *Pennhurst*, this Court also made clear that a federal grant statute requiring only that states submit plans acceptable to federal executive branch officials does not "unambiguously" confer rights on individuals even when the statute contains specific and detailed provisions or the language of rights.

In *Suter*, this Court ruled that the Adoption Assistance and Child Welfare Act of 1980, 94 Stat. 500, 42 U.S.C. §§

620-628, 670-679a, "does not create an enforceable right on behalf of" children "either under the Act itself or through an action under 42 U.S.C. § 1983." 112 S. Ct. at 1363. Specifically before the Court in *Suter* were two provisions of the Act, 42 U.S.C. §§ 671(a)(9) & (15), a child-abuse-and-neglect reporting provision and a provision mandating that states make "reasonable efforts" to preserve families.[7]

In *Suter*, this Court ruled that neither the reporting provision nor the "'reasonable efforts'" provision, despite their mandatory language, "unambiguously confer[s] upon the child beneficiaries of the Act a right to enforce" its requirements. *Id.* at 1367. Thus, although "the Act does place a requirement on the States, . . . that requirement only goes so far as to ensure that the State have a plan approved by the Secretary which contains . . . 16 listed features." *Id.* at 1367.

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[7]They provided at the time of the *Suter* decision:

> In order for a State to be eligible for payments under this part, *it shall have a plan approved by the Secretary* [of Health and Human Services] which --
>
> (9) provides that where any agency of the State has reason to believe that the home . . . in which a child resides . . . is unsuitable . . . because of the neglect, abuse, or exploitation of such child, it *shall* bring such condition to the attention of the appropriate court or law enforcement agency . . .; [and]
>
> (15) . . . provides that in each case, reasonable efforts *will be made* (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home . . ..

112 S. Ct. at 1364 & 1368 n.10, quoting 42 U.S.C. § 671(a)(9) & (15) (emphasis added).

In its decision, this Court distinguished *Wilder*, which found an enforceable right, on the principal ground that the federal statute there, the Boren Amendment, required states to adopt, as part of their federally mandated plans, reasonable and adequate rates for reimbursing providers of medical services and that the providers had urged that the state's plan did not satisfy that requirement. By contrast, in *Suter*, the state plan itself was not challenged but only its implementation.

In *Suter*, this Court also distinguished *Wilder* on the ground that, in contrast to the "reasonable efforts" provision of the Adoption Assistance Act, the statute and regulations at issue in *Wilder* provided guidelines for construing the Boren Amendment's mandate that states pay reasonable and adequate rates. This distinction, however, is insignificant. First, this distinction is not applicable to the reporting provision of the Act which, this Court also ruled, does not create an enforceable right. Second, this Court in *Suter* did not appear to regard the concept of "reasonable efforts" as so vague as to preclude its application by the judiciary. Indeed, as this Court observed, in the Adoption Assistance Act, Congress directed that states be reimbursed for certain expenses on behalf of children involuntarily removed from their homes only after state family courts certify in neglect and abuse proceedings that "reasonable efforts" had been made to keep a child in his home or to return him home. 112 S. Ct. at 1368.

In light of the foregoing, the conclusion is inescapable that the dispositive rationale of *Suter* is that a federal statute does not create individual rights when all that it requires of states is the submission of a plan acceptable to federal authorities. This is so even if isolated provisions of a statute contain mandatory and specific language; these provisions must be carefully examined "in the context of the entire Act;" and it

is the context that determines a state's obligations. 112 S. Ct. at 1370.[8/]

When the language of the McKinney Act relied on by the D.C. Circuit is carefully examined in context, it is clear that the Act does not create enforceable rights. Here, as in *Suter*, the provisions principally relied upon by the D.C. Circuit (42 U.S.C. § 11432(e)(3)-(9)) are merely elements that are required to be included in a state plan pursuant to subsection (e). Under subsection (e), states receiving McKinney Act funds are required only to provide assurances in their plans that local educational entities to which they transmit federal funds will do certain things. The other provisions relied on by the D.C. Circuit are isolated parts of subsections 11432(c) & (d). Neither of these provisions, however, imposes on states obligations to individuals. Subsection (c) merely identifies the activities for which McKinney Act grants may be used, while subsection (d) merely describes the duties of state coordinators.

Wilder, moreover, does not compel a different result. Insofar as *Wilder* is relevant here, it requires two inquiries: (1) whether the McKinney Act is intended to benefit homeless children; and (2) whether, in light of *Pennhurst*, the McKinney Act "does no more than express a congressional preference for certain kinds" of conduct, rather than create binding obligations on the states, which run to and are enforceable by the beneficiaries of the Act. 451 U.S. at 19.

[8/]Assuming, however, that *Suter* can be read as a vagueness case, the District believes that the principal statutory provision invoked by plaintiffs here -- that a homeless child must be assigned to a school based on his "best interest" -- is at least as vague as the "reasonable efforts" provision which this Court in *Suter* regarded as vaguer than the reasonable rates provision at issue in *Wilder*.

Both inquiries must be answered affirmatively. Of course, the Act is intended to benefit homeless children. At the same time, however, it reflects merely a congressional preference for certain kinds of conduct -- *e.g.*, the provision of educational and related services to homeless children -- and does not impose a binding obligation on state governments, that is, an obligation that runs to each and every individual who is a member of the group Congress intended to benefit.

In *Pennhurst*, the Court explained the difference between a congressional preference and a binding obligation in rejecting the argument that the "bill of rights" provision of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010, conferred substantive rights on mentally retarded persons, including "a right to appropriate treatment" in the "least restrictive" environment. *Id.* at 13.[2/] In rejecting the argument of mentally retarded residents of a state hospital receiving funds under the Act that this provision, because it expressly speaks of rights, in fact creates rights, the Court wrote:

2/ The Act stated, *inter alia*:

> "Congress makes the following findings respecting *the rights* of persons with developmental disabilities:
>
> "(1) Persons with developmental disabilities have *a right to appropriate treatment, services, and habilitation for such disabilities.*
>
> "(2) The treatment, services, and habilitation for a person with developmental disabilities . . . should be provided in the setting that is *least restrictive of the person's personal liberty.*

Pennhurst, supra, 451 U.S. at 13, quoting 42 U.S.C. § 6010 (emphasis added).

> Their reliance is misplaced. "'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" . . . Contrary to [their] . . . assertion, the specific language and the legislative history of § 6010, are ambiguous. We are persuaded that § 6010, when read in the context of other more specific provisions of the Act, does no more than express a congressional preference for certain kinds of treatment. . . . *The closest one can come in giving § 6010 meaning is that it justifies and supports Congress' appropriation of money under the Act and guides the Secretary in his review of state applications for federal funds.*

Id. at 18-19 (citations omitted) (emphasis added).

Pennhurst stands for the principle that even when Congress uses the language of rights in a federal grant statute, the statute does not confer enforceable rights on the beneficiaries of the statute when the context in which this language is found indicates otherwise. The same principle applies here. Here, as in *Pennhurst*,

> nothing suggests that Congress intended the Act to be something other than a typical funding statute. Far from requiring the States to fund newly declared individual rights, the Act has a systematic focus, seeking to improve care to individuals by encouraging better state planning, coordination, and demonstration projects.

Id. at 22 (footnote omitted).

The absence of any enforceable rights in the McKinney Act is underscored by two other matters. First, the Act itself expressly contemplates that not all homeless children will receive all the benefits authorized by the Act for which they are eligible. Thus, for example, 42 U.S.C. § 11433(d)(1)(B), which, like the rest of Part B of Title VI, contains no timetable, states that an "application" from a local to a state educational agency for McKinney Act funds "shall include . . . assurances that the applicant complies with *or will use requested funds to come into compliance with paragraphs (3) through (9) of section 11432(e)* . . .." (Emphasis added). See also 42 U.S.C. § 11433(b)(2)(D) (placing limits on the extent to which McKinney Act money may be used to fund transportation of homeless children to and from school even though such limits may preclude the provision of transportation to all eligible children).

Second, the language of the McKinney Act differs in important respects from the language of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*. The IDEA, originally enacted in 1975 as the Education for the Handicapped Act, like the McKinney Act, states that it is intended to ensure a "free appropriate public education" for designated children. 20 U.S.C. § 1400(c). Furthermore, as in the McKinney Act, states participate in the IDEA program by accepting federal funds after submission of a plan acceptable to the Secretary of Education. 20 U.S.C. §§ 1412 & 1413. But there the similarity ends. The IDEA provides that states "shall establish and maintain procedures" elsewhere specified in the Act "to assure that handicapped children . . . are guaranteed procedural safeguards with respect to the provision of a free appropriate public education . . .." 20

U.S.C. § 1415(a).[10/] The IDEA also requires states to identify handicapped children within their jurisdiction and to develop for each of them an individualized education program ("IEP"). 20 U.S.C. § 1415(b)(1). If a parent objects to the IEP, the IDEA requires a due process hearing before an impartial administrative agency. 20 U.S.C. § 1415(b)(2) & (c). Any party aggrieved by the decision may then seek judicial review. 20 U.S.C. § 1415(e)(2).

In the IDEA, Congress unambiguously created enforceable rights. *See, e.g., Smith v. Robinson*, 468 U.S. 992, 1010 (1984) ("Congress made clear that the [IDEA] . . . is not simply a funding statute" but that it "establishes an enforceable substantive right to a free appropriate public education"); *Hendrick Hudson Dist. Bd. of Education v. Rowley*, 458 U.S. 176 (1982). By contrast, in the McKinney Act, Congress, although it had before it an obvious model of how to create an enforceable right to a free, appropriate public education, did not adopt the language of the IDEA. Congress' failure to follow this model is powerful evidence that it had a different program and a different enforcement scheme in mind when it enacted Part B of Title VII of the McKinney Act -- a federal funding program to assist states in their efforts to provide educational and related benefits to homeless children in which state compliance is to be monitored only by the Secretary of

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[10/]Congress did provide for an individual administrative enforcement mechanism in the McKinney Act but, in contrast to the IDEA, left its design to the states, a decision that supports the argument that the Act creates no enforceable rights. 42 U.S.C. § 14432(e)(1)(B) provides:

> Each State shall adopt a plan to provide for the education of each homeless child . . . which will contain provisions designed to . . . provide procedures for the prompt resolution of disputes regarding the educational placement of homeless children . . ..

Education. As this Court stated in *Pennhurst*, "in those instances where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly." 451 U.S. at 17-18.

In short, *Suter* and *Pennhurst* establish that a duty on the part of a state to use federal funds to assist the beneficiaries of a federal statute does not constitute an obligation that runs to each and every beneficiary of the statute. Here, as in *Suter* and *Pennhurst*, it would be wrong to construe modest Spending Clause legislation as providing guarantees specifically enforceable by individuals. The McKinney Act, like the legislation construed in *Suter* and *Pennhurst*, constitutes a modest federal response to a serious social problem which has outstripped the resources of the states and the District; it should not be interpreted as creating enforceable individual rights in the absence of unambiguous language. Indeed, here, this Court's "common sense" admonition in *Pennhurst* (451 U.S. at 24) -- that when Congress does impose affirmative obligations on the states, it usually makes a very substantial contribution to defray costs -- is particularly relevant. The modest sum of money the District receives annually under Part B of Title VI of the McKinney Act is woefully inadequate to cover its potential liability to homeless children for educational and related services should Part B be interpreted as an entitlement program. The disparity between the District's federal benefit and its potential liability itself suggests that no entitlement program was intended by Congress here.

II. THE LOWER FEDERAL COURTS EMPLOY CONFLICTING APPROACHES IN CONSTRUING FEDERAL GRANT STATUTES.

Since this Court's decision in *Suter*, the lower federal courts have questioned whether this Court continues to sub-

scribe to the analytical framework of *Wilder*. *See*, *e.g.*, *Resident Council of Allen Parkway Village v. HUD*, 980 F.2d 1043, 1051 (5th Cir.) (*Suter* "calls into question the continued viability of the framework set forth in *Wilder*."), *cert. denied*, 114 S. Ct. 75 (1993); *Stowell v. Ives*, 976 F.2d 65, 68 (1st Cir. 1992) (With *Suter*, "the old [*Wilder*] regime fell on hard times."); *Clifton v. Schafer*, 969 F.2d 278, 284 (7th Cir. 1992) (following analytical approach of *Suter*, not that of *Wilder*).

Despite their uncertainty whether *Suter* may have altered the analytical framework of *Wilder*, without overruling *Wilder*, the federal courts of appeals, mindful that this Court in *Suter* preserved the result in *Wilder*, have attempted to reconcile the two decisions. Their efforts, however, have produced conflicting analytical approaches among the Circuits and intra-Circuit disagreements, results that underscore the need for this Court to clarify this important aspect of the law.

The Seventh Circuit has ruled that, after *Suter*, a court must focus on the nature, not the specificity and detail, of the obligation Congress has imposed on the states in legislation enacted under the Spending Clause. *Clifton v. Schafer, supra*, 969 F.2d at 284. Thus, if as in that case, the only obligation imposed on states under a federal grant statute is the submission of a plan acceptable to federal executive branch officials, that statute does not permit private enforcement of the plan even if the statute contains detailed language.

The First Circuit, in turn, has focused on the locus of responsibility for compliance with a federal grant statute. As it explained in *Stowell v. Ives*, *supra*, "*Suter* instructs that, when a provision in a statute fails to impose a direct obligation on the States, instead placing the onus of compliance with the statute's substantive provisions on the federal government,

no cause of action cognizable under section 1983 can flourish." 976 F.2d at 70.

Third, the D.C. Circuit, like the Sixth Circuit, has focused on whether a federal grant statute contains "gritty detail." App. 2a. If such a statute contains mandatory language and specific directives, it creates a right enforceable under 42 U.S.C. § 1983 irrespective of the context in which the "gritty detail" appears.

Thus, the basic conditions that states must meet to secure McKinney Act funds are two-fold. First, states must "adopt *a plan* to provide for the education of each homeless child . . . within the State which will contain provisions *designed to*" achieve nine goals. 42 U.S.C. § 11432(e)(1). Second, "[e]ach plan . . . shall assure, to the extent practicable under requirements relating to education established by State law, that local educational agencies within the State will comply with the requirements of paragraphs (3) through (9)." 42 U.S.C. § 11432(e)(2). What the D.C. Circuit did was to read paragraphs (e)(3) through (e)(9), which simply lists those matters for which states must give assurances, as if they were addressed to the states themselves and as if they were independent of paragraphs (1) and (2) of subsection 11432(e).

Similarly, the Sixth Circuit, in *Horn by Parks v. Madison County Fiscal Court*, 22 F.3d 653 (6th Cir. 1994), *petition for a writ of certiorari pending*, No. 94-164, ruled that a federal juvenile justice statute, which provides modest federal funds to states which submit plans designed to improve their juvenile justice systems, creates individual rights enforceable in a section 1983 action. In its decision, the majority did not focus on the nature of the obligation imposed on states by the legislation -- the submission of a plan acceptable to the Department of Justice. Instead, its decision turned on the fact

Department of Justice. Instead, its decision turned on the fact that the legislation contained mandatory and specific language in the provisions of the statute setting forth requirements for acceptable state plans.

The conflicting approaches among the Circuits have been accompanied by intra-Circuit disagreements. Thus, for example, in *Procopio v. Johnson*, 994 F.2d 325 (7th Cir. 1993), the panel, without noting that *Suter* involved two distinct statutory provisions, including one which is quite specific, suggested that *Clifton v. Schafer*, *supra*, had misread *Suter* by not understanding that it turned on vagueness. The panel nevertheless ruled that the statute before it could not be enforced in a section 1983 action because, "[f]or better or worse," *Clifton* is the law of the Circuit. *Id.* at 332. As another example, a divided panel of the Sixth Circuit in *Wood v. Tompkins*, 1994 U.S. App. LEXIS 23498 (August 29, 1994), took the "gritty detail" approach using the *Wilder* analytic framework while purporting to follow the approach of the First Circuit which another panel of the Sixth Circuit had previously adopted. Noting that it was bound by Circuit precedent, the majority wrote that were it not, it "would prefer to avoid the seemingly artificial distinction created by the First Circuit's *Stowell* opinion between statutes that place the 'onus of compliance' directly upon the Secretary and those that place a direct obligation on the states" and it "would decline to adopt such an impermissibly truncated mode of analysis." Slip Op. at 26 n.18 & 26.

This Court should resolve these conflicting approaches and disagreements concerning the meaning of *Suter*, and, in light of *Suter*, it should modify the *Wilder* analytic approach. Among other matters, this Court should reject the approach of the D.C. Circuit here and the Sixth Circuit in *Horn* as flatly in conflict with *Suter*. Any "gritty detail" in a federal grant

statute must be interpreted in context; and if the context demonstrates that the only obligation imposed on states is to submit a plan acceptable to federal executive branch authorities, no right of action lies under 42 U.S.C. § 1983. Furthermore, it should rule that a presumption of an enforceable right does not arise whenever a beneficiary of a federal grant program seeks benefits under that program in court.

CONCLUSION

This case raises an important and constantly recurring issue that has been wrongly decided by the D.C. Circuit and that should be resolved by this Court. This Court should grant the petition for a writ of certiorari and reverse the decision below.

Respectfully submitted,

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